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387225—56——1

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 915

THEODORE TROCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (Pet. App. 19–33) are not yet reported. The memorandum opinion of the District Court (Pet. App. 18) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1956 (R. 62), and the petition for a writ of certiorari was filed on May 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner, a witness before a grand jury investigating violations of federal statutes,

could lawfully refuse to answer the particular questions asked of him on the ground of self-incrimination.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amend. V:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals (R. 62) affirming the judgment of the District Court for the Eastern District of New York committing petitioner to custody for contempt for refusal to answer questions before a grand jury (R. 32–34).

On February 21, 1956, petitioner was brought before District Judge Byers because of refusal to answer questions as a witness before a grand jury. The subject matter of the grand-jury investigation was the illegal transportation of stolen goods in interstate commerce. One Isidore Hillman had been convicted in connection with the theft and was serving his sentence. One Thomas Tanner had been indicted and was a fugitive. Three other persons, according to the Assistant United States Attorney, would be the subject of further indictments if the investigation developed sufficient evidence (R. 3–4). The Assistant United States Attorney further stated: "We have reason to believe that the witness, Mr. Trock,

may have some knowledge of operations, or have some knowledge of the whereabouts of Mr. Thomas Tanner" (R. 4).

The first question asked of petitioner was, "Do you know Harry Baus?" (R. 4, 21). Petitioner first refused to answer the question, then admitted that he had seen Baus in 1950. Upon repetition of the question, he refused to answer upon the ground that the answer might tend to incriminate or degrade him (R. 5–6, 12).

The further questions were (R. 9–12, 21, 23–25, 27):

> Do you know Isidore Hillman?
>
> Do you know William Cooper?
>
> Did you ever operate any business in New York [City]?
>
> Did you ever register in any trade names in New York?
>
> Did you ever have any offices at 250 [or 220] Broadway in New York?
>
> Did you ever have an office at 246 Fifth Avenue, New York City?
>
> Did you ever hear of the Gulf Trading Company?
>
> Did you ever hear of the Empire State Buying Company?
>
> Did you ever use the name of Thomas Tanner?
>
> Did you ever use the name of James Fausto?
>
> Can you type?
>
> Did you ever stay at the Hotel Victoria in New York City?

Petitioner, who was represented before the court by an attorney (R. 2), was asked by the judge for an explanation of how the answers would incriminate him. The following colloquy occurred:

> Mr. TROCK. I honestly feel that making a statement there might incriminate me. That is just the way I feel.
>
> * * * * *
>
> * * * [E]vidently these people are wanted for something and I do not feel like being incriminated with them.
>
> The COURT. What is there that would tend to expose you to a criminal prosecution if you answer the question yes, I do know him, or no, I do not know him?
>
> Mr. TROCK. Well, I honestly feel that way.
>
> The COURT. You have said twice that you feel that way. Now, is that feeling based on a reason?
>
> Mr. TROCK. Well, the reason I feel I am just better off not answering that question.
>
> The COURT. * * *
>
> The second question that you refused to answer is, Did you ever operate a business in New York City?
>
> Now, how could the answer to that question possibly incriminate you?
>
> Mr. TROCK. Well, I am not an attorney, your Honor, and I don't know just which questions are apt to come up.
>
> The COURT. I am dealing with them one at a time. How could it incriminate you

to say yes, I did operate a business, or no, I did not?

Mr. TROCK. Well, I feel that something that I might say might incriminate me.

* * * * *

I feel the same way toward all those questions. [R. 14–15.]

* * * * *

* * * I don't feel that I was brought in here for any reason to find out things, and it is something that I know nothing about and I don't want to answer any questions. [R. 16.]

* * * * *

* * * I was asked all these questions by an FBI agent in Boston, and there must be something to it, and I feel that it is best for me not to answer any of them.

The COURT. * * *

The next question is: Can you type?

How could the answer to that question possibly incriminate you?

Mr. TROCK. Well, when I think it over, I don't think it could because I cannot type.

The COURT. Neither do I. I direct you to answer it.

* * * * *

Mr. TROCK. Well, this [stay at the Hotel Victoria] is something that has happened a few years back. [R. 17–18.]

The judge did not require petitioner to answer the questions concerning Tanner, who was the

missing fugitive under indictment, and concerning Fausto, whose name had been used in some of the correspondence concerning the theft (R. 17, 43), but directed petitioner to answer the remaining questions (R. 14–18). On his return to the grand jury, however, petitioner again refused (R. 20–21).

On February 23, 1956, represented by counsel, petitioner was again brought before the court (R. 20–21). He explained (R. 21–28) his refusal to answer on the ground that "it would tend to incriminate and degrade me" (R. 21) and that he believed "any" question and answer "here" would incriminate and degrade him (R. 21), as shown by the following excerpts from his colloquy with the court.

> Mr. TROCK. I am a conscientious believer.
>
> The COURT. A conscientious believer in what?
>
> Mr. TROCK. I believe that this question will incriminate and degrade me.
>
> The COURT. Is that the only reason that you have to state?
>
> Mr. TROCK. That's it.
>
> The COURT. Is that the only reason that you have to state?
>
> Mr. TROCK. Well, I have been warned by the Court that anything I say will be held against me.
>
> The COURT. Is that the only reason that you have to state?

Mr. TROCK. It is.

The COURT. You are not able to point out any criminal offense that you think you would be exposed to by answering that question; is that so?

Mr. TROCK. That's right. [R. 22.]

* * * * *

The COURT. I ask you, how the answer to that question [office at 220 Broadway] would expose you to a criminal prosecution?

Mr. TROCK. Well, how, I don't know.

The COURT. * * * I ask you again how the answer to that question would tend to expose you to a criminal prosecution? Do you know?

Mr. TROCK. No, I don't. [R. 23–24.]

* * * * *

* * * I feel that those questions lead up to something that might tend to incriminate and degrade me. [R. 24.]

* * * * *

* * * [I]t is just a feeling that I have [R. 26.]

* * * * *

* * * I don't know enough about the law to answer that, your Honor. I can just say—— [R. 27.]

Petitioner was committed to custody for four months, subject to purging himself of the contempt by answering the questions (R. 31–31A).

Bail was denied by the district court (R. 35) but granted by the Court of Appeals (R. 45).

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In its opinion denying bail, the district court stated (R. 35):

> Here there is no suggestion or statement by the witness that would support the inference that he had reason to fear that he would be implicated in any matter being investigated by the Grand Jury. * * * From aught that appears in this record, [petitioner] cannot reasonably be described as a possible co-conspirator with any one, whereby a supposed link in an imaginary chain would be conjured into existence. * * *

At the hearing before the Court of Appeals on petitioner's application for bail, petitioner's counsel produced a photostatic copy of a form letter which had allegedly been used in the theft scheme. The letter, dated December 12, 1952, carried the letterhead "Gulf Trading Corp., 220 Broadway, New York 38, N. Y." and was signed "J. D. Fausto" (R. 43).

On the merits, the order of commitment was affirmed by a divided court (R. 62). District Judge Galston, sitting by designation, expressed the view that:

> * * * It does not require the opinion of a psychologist to establish that one laboring under a guilt complex when appearing before a grand jury might decline to answer any and all questions propounded to him; but such an attitude in and of itself would not protect such a witness from the necessity of complying with a court

order to answer questions which were free from criminal implication, and not part of a link or setting connoting criminal implication. [Pet. App. 22.]

* * * * *

* * * [I]t is not possible to find the presence of such a chain as in indicated in the Supreme Court opinion. There is no showing that the questions asked will "link" the witness with any criminal activity. * * *

* * * In the instant case the appellant is not a notorious criminal or racketeer, nor apparently is anyone else whose name was mentioned in the hearings before the district court. [Pet. App. 24–25.]

* * * * *

It has not yet been said by the Supreme Court that questions innocuous in themselves in a "setting" or chain, such as is revealed in the record before us, would justify the witness in refusing to comply with the court order.

Should the witness decide to comply with the court order, in such event, if a second run of questions were propounded based on such answers as the witness might give to the foregoing innocuous questions, and were such second run questions to present a "hot pursuit", the time would then have arrived for a valid claim of immunity. But as the matter now stands, to quote Judge Swan, "his persistence in claiming privilege is premature." [Pet. App. 26–27.]

Chief Judge Clark, in a concurring opinion, stated (Pet. App. 27–28):

> * * * I am in sympathy with what seems to be the developing law; I shall be relieved, rather than otherwise, if the Supreme Court goes to the logical conclusion toward which it appears to be headed, namely, that any honest claim of self-crimination, deliberately and positively made by a witness before a grand jury—a potential accused—must be respected. * * *
>
> But, trying to apply the law as it has been stated, I do think it clear that to grant the claim here would mark at least a step beyond any yet clearly taken. * * * Here it is only upon a series of assumptions involving the existence of conspiracy and the close connection of the defendant therewith that we can make the forced deduction of self-crimination. Among these assumptions must be (a) that a single dubious question, even though excluded—here the use of the names Tanner or Fausto—makes a setting of danger which carries over to other questions themselves innocent; (b) that inquiries as to residing or carrying on of business in New York City or in particular places therein are taboo; (c) that also taboo are questions as to the witness's capabilities, such as the ability to use a typewriter; and (d) that inquiry cannot be made as to persons named, but otherwise unidentified. Of course on the primary assumptions stated, answers to questions

> such as these may easily be part of a web leading to conviction. But under the heretofore rule, it was just such assumptions which could not be made without something definite in the case to show the innocent appearing questions actually to be deadly. To turn the statement around, I suggest that if these questions without more are incriminating, then there is literally no questions as to the witness's activities, capabilities, or acquaintances which he need answer. If the law is going that far, I think for many reasons, including proper respect for it, that the step should be done directly in the manner suggested above. It should not be accomplished by a form of indirection which can only puzzle prosecutors and courts * * *. So I think we must await the Supreme Court's pilotage to go beyond the law as construed below.

Judge Medina, dissenting, stated (Pet. App. 30–31, 33):

> * * * [T]wo of the questions put to appellant were, whether he ever used the name of Thomas Tanner, the missing fugitive from justice, and whether he ever used the name of James Fausto, a man connected with the purchasing department of Gulf Trading Corp. When appellant was brought before the judge for rulings on the questions these two were excluded, but they had been asked and the prosecutor thought them of sufficient importance

> to request the judge to direct the witness to answer them. This could scarcely have failed to impress appellant with the fact that he was at least suspected of using as aliases the very names of the fugitive and a person who might well prove to be the leader of the whole group. * * * Furthermore, he had been asked these same questions by an FBI agent in Boston.
>
> * * * * *
>
> * * * [S]omeone whose real or assumed name was Fausto was participating in alleged illegal transactions through the instrumentality of Gulf Trading Corp. at 220 Broadway in New York City, and doing so by the use of typewritten documents. * * *
>
> * * * * *
>
> * * * [A]ppellant may turn out to be one of the unnamed and unidentified missing men, or to have participated in some direct or remote way in the illegal scheme, and * * * any information provided by answers to any of the questions may complete or lead to the completion of the chain of proof against him. * * *

DISCUSSION

In *Hoffman* v. *United States,* 341 U. S. 479, 486–487, this Court summarized the principles governing a claim of self-incrimination before a grand jury as follows:

> The privilege afforded not only extends to answers that would in themselves sup-

port a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (*Patricia*) *Blau* v. *United States,* 340 U. S. 159 (1950). But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *Mason* v. *United States,* 244 U. S. 362, 365 (1917), and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, *Rogers* v. *United States,* 340 U. S. 367 (1951), and to require him to answer if "it clearly appears to the court that he is mistaken." *Temple* v. *Commonwealth,* 75 Va. 892, 899 (1881). However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be

governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." See Taft, J., in *Ex parte Irvine,* 74 F. 954, 960 (C. C. S. D. Ohio, 1896).

Under this test, the issue in the case narrows down to whether the underlying circumstances of the grand-jury investigation—including, *inter alia,* the prosecutor's asking the witness whether he was one of the missing men, and the production of the typed letter from the Gulf Trading Company[1]—were sufficient to establish "that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." 341 U. S. at 487. The dissenting judge thought this showing sufficient; the majority thought the questions which the witness was directed to answer too innocuous, even in relation to this background, to support the claim of privilege.[2]

While recognizing the weight that must be accorded to the judgment of the trial judge in this type of case, this Court in recent decisions, in the interest of protecting the important constitutional right involved, has reviewed and set aside

[1] Concerning the letter, produced for the first time in the Court of Appeals (*supra,* p. 8), cf. *Hoffman* v. *United States,* 341 U. S. at 489.

[2] In this connection it should be borne in mind that petitioner was represented before the court by an attorney, so that inarticulateness cannot account for the absence of a more explicit showing of danger.

judgments of lower courts on the ground that the principles relating to the privilege have not been properly applied to specific factual situations. *Hoffman* v. *United States*, 341 U. S. 479; *Brunner* v. *United States*, 343 U. S. 918; *Greenberg* v. *United States*, 343 U. S. 918; *Singleton* v. *United States*, 343 U. S. 944. And see *Emspak* v. *United States*, 349 U. S. 190, 198–201. But, as the division of opinion in the court below makes clear, the problem is essentially one of individual judgment.

CONCLUSION

In any event, it is respectfully suggested that the case is an appropriate one for summary disposition. The facts of the instant case clearly appear in the opinions below and in the Statement (*supra*). As in *Singleton* (O. T. 1951, No. 666, p. 5), no question of law not heretofore fully briefed is now involved (see briefs in *Hoffman*, O. T. 1950, No. 513; *Brunner*, O. T. 1951, No. 442; and *Greenberg*, O. T. 1951, No. 461). Accordingly, if the Court should conclude that the essentially factual determination below should not be disturbed, the petition for a writ of certiorari should be denied. On the other hand, if this Court should conclude that the court below erred in its determination, the petition should be granted and the judgment

below reversed without further briefing and argument. Cf. *Singleton* v. *United States, supra.*

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY, III,
Assistant Attorney General,
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

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